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SUBJECT: GERMAN ADMINISTRATIVE COURT RULES AGAINST MONSANTO

REFS: A) Munich 90 B) BERLIN 520 C) BERLIN 658

SENSITIVE BUT UNCLASSIFIED

11. (SBU) SUMMARY. On May 28, 2009, a higher Administrative Court in Lueneburg, Germany rejected Monsanto's appeal to lift the MON 810 biotech corn cultivation and marketing ban imposed by the German Agricultural Ministry. The decision upheld an earlier lower Administrative Court's ruling on May 5, 2009. Germany is now the sixth EU member state banning cultivation of MON 810 corn. END SUMMARY.

COURT REJECTS MONSANTO'S APPEAL

12. (SBU) Immediately after a lower Administrative Court in Braunschweig, Germany refused to stop the April 14 ban of MON 810 by the German Agriculture Ministry, Monsanto appealed to a higher court. On May 28th, the higher court in Lueneburg, Germany upheld the lower Administrative Court's ruling and rejected Monsanto's request for an injunction. The higher court specifically stated that the safeguard clause laid down in the German Genetech Law, Section 20.2, only requires a risk of an abstract danger to human health or the environment. The premise can simply be based on new information; clearly defined and scientifically supported evidence is not required.

14. (SBU) Given that other EU member states (i.e. Austria, Hungary, Luxemburg, etc.) have already set a precedent by banning MON 810 cultivation, the court stated that there is no reason to further assess the studies used to justify Germany's ban. The existence of other national bans proves that Germany's decision is not arbitrary. It also indicated that the economic interests of farmers who want to plant MON 810 varieties are not as important as the environmental protection aspects asserted by BMELV.

15. (SBU) The court also maintained that the national courts are not required to assess the validity of the national bans during summary proceedings. It stated that national governments have the discretion to include political aspects in developing government policies. Thus, the fact that technical experts of BVL did not support the ban is irrelevant.

MON 810 LEGAL OUTLOOK IN GERMANY

16. (SBU) Next steps: The principle lawsuit which focuses on the legality of the cultivation ban will be again handled by the lower Administrative Court in Braunschweig, which has already decided against Monsanto's urgent appeal to suspend BMELV's ban. The Braunschweig Court has not yet announced when they intend to deal with the more substantive part of Monsanto's complaint. BMELV expects that it could be the fall of 2009 at the earliest.

17. (SBU) COMMENT: The Lueneberg Court's decision focused only on Monsanto's urgent appeal to suspend the ban until a ruling is made

on the legality of BMELV's order. The court did not find that BMELV overstepped its authority. However, there are a number of possible scenarios in which the ban could be lifted: 1) The Administrative Court in Braunschweig could theoretically take up the case and force BMELV to lift its ban; 2) The next German Government, which most likely will be in place by November 2009, could reconsider the decision to ban MON 810 cultivation. Under this scenario, it would be up to the next Minister of Agriculture to take action; or 3) The EU reapproves MON 810 for food/feed use and cultivation. This would require a European Food Safety Agency (EFSA) assessment that finds the studies used by EU member states to justify the MON 810 bans do not meet EU regulations. An EU re-approval would automatically nullify all existing national bans, including Germany's. Under this scenario, member states wishing to ban biotech crop cultivation would again have to justify their safeguard clause applications. According to industry contacts, the chances of a court ruling on this matter before November 2009 are rather bleak. END COMMENT.

KOENIG